REMOTENESS OF CHARITABLE GIFTS.

IN the sixth volume of the HARVARD LAW REVIEW, page 195, my learned friend, Mr. Jabez Fox, has criticised me for saying that the true object of the Rule against Perpetuities is to restrain the creation of future conditional interests, and that it is not aimed directly at preventing the non-alienation of property. Mr. Fox's main purpose, however, is not so much to refute this particular error, as to condemn a method of treating legal subjects of which he finds in me an example.

A writer who employs this method, in considering a case, will neglect the grounds upon which the counsel have placed their arguments and the court its judgment, and will base the decision on reasoning which never occurred to any of the persons who were actually concerned in the case; in short, he will treat the rulings of the court as the utterings of Balaam's ass, absolutely true, but not presupposing any conscious intelligence in the creatures from whom they proceed. Although using my own words, I feel quite sure that I have given Mr. Fox's meaning correctly; and, if I have, I agree with him in his condemnation of such a method.

I will go further, and will add what my learned friend may have had in mind, though he was too civil to express it.

When a student is beginning to read law, and one legal proposition is the same to him as any other, it is essential for an instructor to insist strongly upon the distinction between the *dicta* and the *ratio decidendi* in a case; but there is risk of exaggeration, the distinction may be pushed too far; and I admit frankly that to do so is a temptation in academic instruction to both teacher and student; I am conscious of having yielded to it myself; I have warned others against it; if I have been guilty of it here, I cannot plead ignorance of the danger; if I have sinned, I say Amen to my learned friend's anathema.

But have I sinned in this particular matter? Is the statement criticised an offspring of this justly condemned method of dealing with the authorities?

The rise of many doctrines in our law is unknown or has to be guessed from remote and uncertain sources, and the natural growth of many doctrines has been interrupted by legislation or by

theories and practices borrowed from particular callings. But the Rule against Perpetuities is of comparatively modern origin; we can trace it from its beginnings; and its development has been singularly little affected by legislation or by outside influences. It is pre-eminently a common-law doctrine, born and bred in the courts, and in its growth a typical example of the development of the common law. None better can be found. This has always seemed to me to give it a peculiar interest.

What, then, is the normal development of a doctrine in our law?

Generally, it first emerges in the judicial consciousness in a vague and somewhat formless condition, and when it begins to take shape its limits are now too narrow and now too broad. Gradually, as successive generations of lawyers and judges deal with it, it acquires a defined outline; sometimes it is broadened so as to cover cases not within its first expression, sometimes it is narrowed so as to exclude cases which, though within its terms as first laid down, are not within its principles as finally developed. But when a legal doctrine is in its early stage, statements are often made and theories often advanced by judges which are, and necessarily must be, vague and not in entire harmony with the form which the doctrine finally takes; and yet it is a common phenomenon for these early statements and theories to survive and be repeated, even when the law has been settled in a manner really inconsistent with them; and such survival leads not infrequently to decisions which cannot be reconciled with what have been established and are acknowledged as true principles. Nor is this strange. To have constantly in the mind such a complete conception of a doctrine, as to feel at once the discordance of every proposition not entirely in harmony with it, is a rare gift in any one, be he a judge or not.

Instances might be multiplied *ad libitum.*

What is the true ground of prescription at the present day? It is analogy to the statute of limitation. Yet courts were formerly in the habit of sustaining it on what later judges have called "the revolting fiction" of a lost grant, and the obviously wrong decision that a subsequently occurring disability suspends the running of prescription was logically enough based upon this fiction in Lamb *v.* Crosland,[1] as late as 1850.

So, in case after case, the doctrine that "the general intent must

[1] 4 Rich. 536.

overrule the particular intent" was announced as the true principle underlying the application of the rule in Shelley's case; and, even after the luminous expositions of Lord Redesdale and Lord Wensleydale and Chief Justice Cockburn, when one might have hoped that it had been rooted out of the law, we find it still invoked in 1884 to sustain a very doubtful decision in Bowen *v.* Lewis.[1]

Again: "The transfer of personal chattels is governed by the law of the domicile of the owner." How often has this been said by judges of the greatest eminence. Yet it is not true of transfers *inter vivos* of particular chattels. It would be hard to find a decision to that effect. And at last some text-writers are plucking up courage to say so.

I will not multiply instances: the learned reader can think of them for himself; indeed, a great part of the history of the law might be written by the consideration of such cases.

How, then, should a writer deal with a topic in the law which has passed through a history like this? Certainly, he should not form an *a priori* theory of how the law *ought* to have developed; but if he finds that the law *has* developed in a particular way, he should not be deterred from saying so because judges in the older time have not been gifted with piercing prophetic vision, and have used expressions which cannot be made to square with the matured doctrine of to-day, nor even because those *dicta* of earlier courts are to be found in the mouths of modern judges.

When, as in the case of the Rule against Perpetuities, all the late developments of the law cannot be reconciled, it is not always easy to determine which represent legitimate lines of growth, and which are bastards, to be recognized only as exceptions. I suspect these latter will often be found to have had their origin in some inaccurate *dictum* of an early court.

Of course, I do not suppose that I have been able always successfully to distinguish the true doctrine, but the method which I have followed has been to study the decisions which have actually been made, and to try to determine which seem to bear the notes of legitimacy; I have not, consciously at least, employed the method which Mr. Fox condemns, viz., the substitution of one's *a priori* conceptions for the decisions of the courts.

To come to the specific difference between Mr. Fox and myself; it can best be stated in a concrete form.

[1] 9 Ap. Cas. 890.

On the application of the Rule against Perpetuities there are, in modern times, two sets of decisions which cannot be reconciled.

First. It is held that if land be given to A and his heirs, with an option of purchase at any time by B and his heirs, the gift to B is too remote and therefore bad.

Second. It is held that if land be given to X Charity until some contingency, which may be remote, happens, and then to Y Charity, the gift to Y Charity is good.

In favor of the validity of the gift to B it is urged that B's interest is alienable at any time; to which the answer made is that such fact is immaterial, for B's interest is dependent on a remote contingency.

Against the validity of the gift to Y Charity it is urged that it is dependent on a remote contingency, to which the answer made is that such fact is immaterial, for the interest of neither X nor Y is alienable.

That is, the first class of cases puts as the test of invalidity the remoteness or nearness of the contingency on which the gift is to take effect, while the second puts as such test the restraint or non-restraint of an interest which is legally alienable. The first class of cases says the rule does not apply to vested interests. The second class says the rule does not apply to inalienable interests.

One of these views represents the true theory, and the other is an exception. Or, in Mr. Fox's words, one is a "misfit." Now which is the misfit? Mr. Fox believes it to be the first. I believe it to be the second.

My learned friend thinks I am wrong because many judges have said that the object of the Rule against Perpetuities is to prevent property from being made inalienable.

The facts seem to be these:—

The judges, from the earliest times, have been opposed to perpetuities. I do not know that any one has thoroughly investigated the cause, but the fact, I suppose, is undeniable.

A perpetuity could arise in two ways, *first*, by taking from the owner the power to alienate property; *secondly*, by allowing interests to be created *in futuro*. In the beginning these ideas were confounded; gradually they were differentiated; the *first* gave rise to the Rule forbidding restraints on alienation, the *second* to the Rule against Perpetuities.

When this differentiation occurred, it was inevitable that a fur-

ther question should arise. Is the second rule merely a form of the first? Is a remote future interest objectionable only because for too long a period there may be no one who can give a good title; or is it objectionable also because the policy of the law does not allow interests so uncertain in value to hamper a present ownership? Under many circumstances, whichever principle was applied the judgment would be the same; but, finally, cases arose which required a decision of this question, and in them it was held that the second rule was more than merely a form of the first, and that interests, although alienable, might yet be bad for remoteness; or, in other words, that the validity or non-validity of an interest did not depend solely on whether the alienability of the property was affected, but on whether the interest was upon a remote condition.

This was involved in the decision of a case in England as early as 1764, Grey *v.* Montague,[1] and in the United States, in Brattle Square Church *v.* Grant,[2] in 1855.

It is not strange that remarks can be found, made by early judges and repeated by later ones, to the effect that the Rule against Perpetuities is intended to prevent restraints against alienation, for that is true, although the later course of decision to which I have referred shows that it is not an exact statement of the whole truth. Such a state of things one would naturally expect; it is entirely in accordance with the physiology, if I may use the word, of the common law.

It is true that in Avern *v.* Lloyd,[3] Vice-Chancellor Stuart held an interest subject to a remote condition to be good because it was alienable, saying: "It seems obvious that such a case is not within the principle on which the law against perpetuity rests;" and that in Birmingham Canal Co. *v.* Cartwright,[4] Fry, J., held that an option to buy on a remote contingency was good. He said: "I think that wherever a right or interest is presently vested in A and his heirs, although the right may not arise until the happening of some contingency which may not take effect within the period defined by the Rule against Perpetuities, such right or interest is not obnoxious to that rule, and for this reason. The rule is aimed at preventing the suspension of the power of dealing with property, — the alienation of land or other property. But, when there is a present right of that sort, although its exercise may be dependent

[1] 2 Eden, 305; s. c. 3 B. P. C. (Toml. ed.) 314.
[2] 3 Gray, 142.
[3] L. R. 5 Eq. 383 (1868).
[4] 11 Ch. D. 421 (1879).

upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property."

These cases certainly support Mr. Fox's view; but in London & S. W. R. R. Co. *v.* Gomm,[1] the Court of Appeal expressly overruled Birmingham Canal Co. *v.* Cartwright, and held that an option to buy on a remote contingency was bad; and the case of Avern *v.* Lloyd, which, in common with all text writers I had ventured to doubt, has, since I wrote, been overruled in terms by the Court of Appeal, in *Re* Hargreaves.[2]

This, surely, is a striking illustration of the phenomenon to which I have called attention. Here we have two judges, exceptionally able judges, misled by the incomplete form in which former courts had declared a doctrine, and, in consequence, making decisions which had to be overruled.

Again Mr. Fox quotes from the opinion of the Supreme Court of Massachusetts in Odell *v.* Odell.[3] "The reason of the rule is that to allow a contingent estate to vest at a more remote period would tend to create a perpetuity by making the estate inalienable;" (Mr. Fox stops here, but the passage continues thus) "for the title of the first taker would not be perfect, and until the happening of the contingency it could not be ascertained who was entitled, and the estate could not be alienated, even, as has been said, if all mankind should join in the conveyance."[4]

But about a year ago, the same court said: "It has sometimes been suggested as a reason for the Rule against Perpetuities, that it is impossible for the owners of the estate to convey it, and that the estate is rendered inalienable, 'though all mankind should join in the conveyance.'[5] This statement is not accurate in reference to many estates which come within the rule. The mere fact that a contingent interest may be released by persons in being, and that a good title may thus be made, is not enough to take the case out of the rule, if the estate cannot be alienated by those having vested interests in it, because a possible future interest is created which may not vest within the time fixed by law.[6] A careful examina-

[1] 20 Ch. Div. 562 (1882).
[2] 43 Ch. Div. 401 (1889).
[3] 10 All. 1, 5.
[4] Brattle Square Church *v.* Grant, 3 Gray, 142.
[5] Brattle Square Church *v.* Grant, 3 Gray, 142, 152.
[6] Gray on Perpetuities, 275, 329, 330; London & Southwestern Railway *v.* Gomm, 20 Ch. D. 562.

tion of the cases will show that this has always been the law in Massachusetts. . . . This appears also in the leading case of Brattle Square Church *v.* Grant,[1] in which a single ambiguous or inaccurate expression has sometimes led to a misunderstanding of the law intended to be quoted. . . . Undoubtedly the fact that the holders of vested interests cannot convey tends to make the property practically inalienable, for oftentimes the holders of contingent interests are unknown or cannot be found, and if they are accessible, it is not easy to obtain releases of contingent rights on which it is impossible to fix a value. But the possibility of obtaining releases is not the test by which to determine the validity or invalidity of a limitation."[2]

I hope my learned readers will agree that I have cleared my skirts of the charge of substituting my own vain imaginings for the matured doctrines of the reverend sages of the law.

The case which Mr. Fox considers to set forth the true doctrine is Christ's Hospital *v.* Grainger,[3] in which Lord Cottenham held that a limitation over from one charity to another was good without regard to its remoteness. He said: "It was then argued that it was void as contrary to the Rules against Perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another?" And he thought not. His remarks on the subject occupy less than a dozen lines.

I cannot reconcile the principle of this case with the principle of London & S. W. R. R. Co. *v.* Gomm, of *Re* Hargreaves, and of Winsor *v.* Mills. Mr. Fox does not attempt to reconcile them. He would call the latter cases misfits. I am not aware that any one has reconciled them.

Cessante ratione, cessat ipsa lex, may be a sound maxim, but there is sometimes more than one reason for a rule. Lord Cottenham's error was, I humbly conceive, this: He saw that *a* reason for applying the Rule against Perpetuities did not exist in that case, and he assumed too hastily that the rule had no other reason.

Either the English Court of Appeal and the Supreme Court of Massachusetts are wrong in extending the operation of the Rule against Perpetuities beyond those cases where some question of

[1] 3 Gray, 142.

[2] Winsor *v.* Mills, 157 Mass. 362, 365, 366.

[3] 1 McN. & G. 460 (1849).

alienability is involved, or Lord Cottenham was wrong in confining it to those cases.

I will not repeat what I have said elsewhere on this question, but a case has been lately decided which shows in a surprising, and indeed startling manner, that there was rather a sin of omission on the part of Lord Cottenham, than a sin of commission on the part of the other courts. Indeed it is this case which has led me to write these few pages. If I had conceived of the ingenious structure which a clever conveyancer has since raised on Lord Cottenham's opinion, I should have had a stronger argument against the correctness of that opinion than any that I employed. A better illustration of the danger of throwing over a principle because its application to the facts is not immediately obvious, has seldom occurred.

In *Re* Tyler[1] A gave £42,000 to the London Missionary Society, and committed to their keeping the keys of his family vault, the same to be kept in good repair; "failing to comply with this request, the money left to go to the Blue Coat School." The Court of Appeal felt bound by Christ's Hospital *v.* Grainger, which had stood for over forty years, and as a necessary consequence, they held the condition good. A gift over from one charity to another had been decided not to be too remote; and, so long as it was not charged on any particular fund, there was nothing illegal in repairing a tomb.

Yet see to what this leads; A gives $200,000 to Harvard College, on condition that, on the first day of January in each year, it pays $5,000 to the then heir of the body of A, and if it fails to do so, then the fund to go to Yale College. The gift over to Yale College is, according to Christ's Hospital *v.* Grainger, and *In re* Tyler, perfectly good; and so long as not charged on any particular fund, there is nothing illegal in paying $5,000 to the heir of the body of A on the first day of every January. But is not such an arrangement against public policy? Which is the sounder view of the Rule against Perpetuities? That which condemns, or that which sanctions such a scheme?

Let no one say that such a scheme is fanciful. On the contrary, there is a Church not a thousand miles from Cambridge which holds a fund now amounting to not far from $200,000, under a trust to pay half the income upon demand to the person

[1] [1891] 3 Ch. 252.

who is for the time being heir of the body of the founder, and the founder subsequently directed that on failure to do this, the fund should go to another Church in the neighborhood. The fund was established before the decision in *Re* Tyler, and indeed before Christ's Hospital *v.* Grainger was decided; the founder appears to have been his own conveyancer, and I suppose that on the deeds of foundation, as actually drawn, the gift to the heir of the body of the founder for the time being is bad on any theory, but how easily could the founder, had he known it, have adopted the device used in *Re* Tyler. When that device is generally known, many a rich man will seek an assurance of perpetual wealth for his descendants by attaching such a conditional limitation to a charitable gift.

I wrote of Christ's Hospital *v.* Grainger, that the "decision has stood so long unquestioned that it is likely to be followed;" but the dangerous possibilities disclosed by *Re* Tyler make this perhaps more doubtful.

To believe two contradictory propositions at the same time is common enough, but is no part of the duty of a legal writer. If he finds two doctrines which apparently disagree, he should seek to reconcile them. If he cannot do this himself, and if he can find no one to do it for him, he must choose between them.

If both are established, he must determine which represents the main principle, and which the anomaly, the exception, and to do this he should look at the past and at the future, at history and at consequences.

I do not disguise from myself the difficulty of the task. Whether, as to the matter in question, I have found a real disagreement or only a mare's nest, and whether, if there be two different irreconcilable views, I have chosen the right one, I leave to the judgment of the candid reader.

I sincerely approve of my learned friend Mr. Fox's general criticism; that I do not think his illustration a happy one, is perhaps natural enough. To applaud a sermon, but to believe that one's neighbors need it rather than one's self, is nothing new.

I had thought of adding a word upon Mr. Fox's strictures of Judge Holmes's articles, but have forborne for the good reason that I do not know enough about the subject discussed.

John Chipman Gray.